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No. 76-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CRUTCHER-ROLFS-CUMMINGS, INC.,

Petitioner,

v.

SAM L. BALLARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TEXAS COURT OF CIVIL APPEALS,
THIRTEENTH SUPREME JUDICIAL DISTRICT,
CORPUS CHRISTI, TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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**TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:**

Respondent, Sam L. Ballard opposes the granting of the Petition for Writ of Certiorari to review the judgment of the Texas Court of Civil Appeals, Thirteenth Supreme Judicial District (Corpus Christi) in this cause.

STATEMENT

Respondent brought this suit against Petitioner to recover for breach of a confidential relationship and for breach of contract. The jury returned a verdict in favor of Respondent. Judgment was entered that Respondent re-

cover actual damages of \$674,873.02 and punitive of \$650,000.00 for a total of \$1,324,873.02. The facts and the development of the case are fully set forth in the Opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas sitting at Corpus Christi (Appx. A-1 through A-17, inclusive). Petitioner's Application for Writ of Error to the Supreme Court of Texas was refused, no reversible error.

In 1949, Respondent approached the president and founder of Petitioner, Mr. A. S. Crutcher, to solicit assistance in developing a vertical pipe bending machine. Respondent demonstrated to Mr. Crutcher and several corporate officers a scale model of his machine. Respondent was immediately employed by Petitioner and a co-development agreement was reached. The letter reflecting the terms of the agreement was drawn and signed on November 8, 1949, by Respondent and A. S. Crutcher, for Petitioner (Appx. C-1).

Through the joint efforts of Petitioner and Respondent in March of 1950, Respondent filed a patent application in the United States Patent Office on the vertical pipe bending machine. Respondent used Petitioner's attorneys and the Petitioner bore the expense.

The vertical pipe bending machine resulted from the need which arose in the pipe line industry for a portable machine for use in the field on the pipe line right-of-way which would perform smooth cold bending of large diameter (12 to 36 inches) steel pipes (thirty to forty, sometimes eighty feet in length) of the types used in cross-country oil and gas pipe lines. The bend specifications for such pipes require that the bends be full, round, smooth and wrinkle free. The machine is operated by cables or hydraulics for

bending pipe in a vertical plane above the right-of-way, thus avoiding rough terrain or wooded areas on either side which could not be avoided by horizontal bending machines.

On November 3, 1950, the United States Patent Office declared an interference between the Ballard application on the vertical machine and the Coody application on a horizontal machine licensed to a company known as Cinch, Inc. By decision of the Board of Patent Interferences, Respondent was awarded priority of invention and Cinch filed suit against *Petitioner and Respondent* to set aside this decision. This litigation was ultimately settled by agreement in 1954, in which *Respondent and Petitioner* agreed not to sue Cinch for infringement in connection with hydraulic machines and Cinch agreed not to sue *Petitioner* for infringement in connection with cable machines.

On December 6, 1954, Respondent and Petitioner reconfirmed their agreement by executing a second written instrument (Appx. D).

By 1965, Cinch, Inc. or its successor was capturing the greater portion of the pipe bending machine market. In January, 1966, Petitioner purchased all of the issued and outstanding shares of its principal competitor and thereby acquired 82.04% of the outstanding shares of Crose United Corporation, successor to Cinch, Inc.

In February, 1966, Ernest E. Cummings, a director and vice-president of Petitioner was sent to Kerrville, Texas to persuade Respondent to sign a letter of agreement to the effect that Respondent would not be entitled to a royalty on the hydraulic bending machines manufactured, used or sold by Petitioner. Respondent was not persuaded and refused to sign the letter agreement.

In May of 1966 Petitioner transferred substantially all of the operating assets of Petitioner to Crose United Corporation. Also in May, 1966, the name of Crose United Corporation was changed by Petitioner to CRC Crose International, Inc. Thereafter, Petitioner knowingly failed to pay Respondent royalties on the hydraulic vertical pipe bending machines. Further, Petitioner instituted a scheme of corporations knowingly designed to remove the physical manufacturing, using, selling or renting of vertically operated hydraulic pipe bending machines from the corporate entity obligated to Respondent to a remote subsidiary in which Petitioner benefited through stock ownership. The development of the fraudulent scheme is illustrated by Exhibit A to this Brief.

The jury found, in part, that a confidential relationship existed between Respondent and Petitioner; that Petitioner breached the confidential relationship by failing to pay royalties on the net revenues resulting from the manufacture, use, sale and rental of vertical hydraulic pipe bending machines; that \$674,873.02 would compensate Respondent for the breach of confidence; that the then president of Petitioner (William Carey Crutcher, the son of founder, A. S. Crutcher) knew or should have known of the failure to pay such royalties; and Respondent should recover punitive damages of \$650,000.00.

Objection To Jurisdiction

The Court of Civil Appeals correctly held that the federal patent laws are not determinative of the rights of Respondent because the rights he sought to protect arise out of the confidential relationship and contract with Petitioner. The laws of the State of Texas protecting such rights are not inconsistent with the patent laws and therefore the

supremacy clause of the United States Constitution has no application.

This is not a suit for patent infringement. Except as Petitioner sought to introduce such spurious issues, the suit does not involve the validity or enforcement of any patent rights under the laws of the United States. This is not solely a "trade secrets" case. It is, further, a case of Petitioner's fraudulent conduct in seeking to exploit the total benefits of a confidential relationship between Petitioner and Respondent without accounting to Respondent.

Respondent was not a stranger simply licensing a patent to Petitioner. Respondent and Petitioner were co-developers, joint venturers, using the Respondent's know-how and principles in the development of vertical pipe bending machines and parts therefore. *Saco-Lowell Shops v. Reynolds*, 141 F.2d 587 (4th Cir. 1944).

To identify the subject matter of the confidential relationship, Petitioner and Respondent stipulated in the trial court that the vertical pipe bending machines were manufactured in accordance with specific drawings and that the accounting records of the child and grandchild subsidiaries of Petitioner attached to the stipulation established the amount of revenues produced by the machines illustrated in the drawings. From these drawings Respondent established the machines as the subject matter of the confidential relationship breached by Petitioner and the damages resulting therefrom.

The law is clear from *Saco-Lowell Shops v. Reynolds*, *supra*, at page 597:

• • •

"The liability of defendant here is not to be determined as upon a charge of patent infringement nor

even as in the case of an ordinary licensee under contract for the payment of royalties, for the reason that the J frames upon which royalties are claimed embody not only the fundamental ideas embodied in the Reynolds invention but also a specific application of those ideas evolved by Reynolds himself and communicated to defendant because of the confidential relationship into which the parties had entered for the development of the invention."

* * *

The law of the State of Texas governing confidential relationships, as they are defined in Special Issue No. 2, (Appx. J-3) to mean:

"... every form of relationship between parties wherein confidence and special trust is reposed by one in another and he is justified in placing such trust and confidence in such other party and relies upon such other party to protect his interest. This relationship is based upon fair dealing and good faith, rather than legal obligation. The term includes informal relationships such as moral, social, domestic, or merely personal ones, where one trusts in and relies upon another"

involves only the right of the State to govern particular business dealings and fraudulent conduct in such dealings.

Very basically stated:

"Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscionable advantage is taken of another." *Black's Law Dictionary*, 4th Ed. at p. 789.

The Texas law applied by the Court of Civil Appeals in this case is supported in *Dupont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102, (1917):

"The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets he must take the burden with the good."

The scheme of corporate subsidiaries (see Exhibit A) used by Petitioner to commercially exploit the vertical pipe bending machines without accounting to Respondent was a breach of trust. Petitioner continued to assert the scheme as a bar to Respondent's claim. This breach of faith, justly reposed, was fraudulent conduct, clearly governed by independent state law, not dependent upon nor in contravention of federal patent law.

The only involvement of the Ballard patent in this cause was its use to define the subject matter and the duration of the confidential relationship and contract.

The question belatedly sought to be raised by Petitioner regarding the issuance of a patent being a "disclosure"

sufficient to defeat a confidential relationship is purely a question of state law as to a particular party such as Petitioner found to be in a confidential relationship with another such as Respondent.

The application for and the issuance of a patent under federal law may be used under state law as a factor in determining the existence of a confidential relationship but it is not determinative of the question. Further, the patent law was never intended to be a cover for fraudulent conduct so as to allow a party such as Petitioner to avoid the basic obligation of good faith in a relationship of special trust.

If it is assumed that Petitioner properly raised any federal question, nevertheless the judgment of the Texas Court of Civil Appeals is based on adequate and independent state grounds. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

The only questions presented to and decided by the Texas Court of Civil Appeals were questions involving the application of long established equitable principles of state law to the facts of this case. The judgment and opinion is grounded entirely on state law. No federal questions were decided in the Court's opinion. The Supreme Court of Texas refused the Writ of Error, no reversible error, without expressing any basis for its decision. (Appx. 5-1)

There were no federal questions embraced within the scope of or subsidiary to the courts' decisions on the questions discussed in detail and decided in the Opinion of the Court of Civil Appeals. (Appx. A)

Reasons For Not Granting the Writ

In this breach of confidential relationship and contract case there are no special or important reasons for granting the Writ of Certiorari, *Supreme Court Rule 19*. No consti-

tutional questions are involved. No important policy issues are presented concerning the balance between the state and federal judicial systems, the relations of the branches of the federal government of the fundamental rights of the individual in relation to government. While this case is important to the parties, it does not involve any principles the settlement of which are of special significance to the public.

There is no conflict in the judgment and decision of the state court in the application of the laws of confidential relations and contracts under the facts in this case and the cases heretofore decided by this Court from *E. I. DuPont de Nemours Power Co. v. Masland*, *supra*, through *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). The Texas Court of Civil Appeals in its decision has effectively followed the principles of law enunciated in those cases. There have been numerous decisions of inferior federal courts which have likewise followed the holdings of this Court in these cited cases. For example, *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 161 (2nd Cir. 1946) dealt with the New York state law of unjust enrichment as applied to facts very similar to those we have here.

While the state court has not decided a substantial federal question, it is respectfully submitted that if it has then its decision is in accord with applicable decisions of this Court and a majority of other courts that have handed down decisions and written on the subject. The courts do not allow the technical aspects of corporate, real estate or patent law to shield fraudulent conduct.

The Texas Court of Civil Appeals followed the principles of *Hyde Corporation v. Huffines*, 314 S.W. 2d 763 (Tex. 1958) cert. denied, 1958, 358 U.S. 898 and *K & G Oil Tool & Service Co. v. G & G Fishing Tool Service*, 314 S.W.2d

782 (Tex. 1958) cert. denied 1958, 358 U.S. 898, regarding the peculiar and distinct obligations of a party in a relationship of special trust. These principles are consistent with other jurisdictions requiring such utmost good faith from one in a relationship of special trust as to distinguish them from the public at large. *Smith v. Dravo Corporation*, 203 F.2d 369 (7th Cir. 1953), (which applied in a diversity of citizenship case, the law of Illinois and the law of Pennsylvania under the Illinois doctrine of conflict of laws); *Shellmar Products Co. v. Allen-Qualley Co.*, 87 F.2d 104, (7th Cir. 1936); *Franke v. Wiltsechek*, 209 F.2d 493, (2nd Cir. 1953) (which applied in a diversity of citizenship case, the law of New York).

The Petitioner has misdescribed the decision of the Court of Civil Appeals, but in any event, it has shown no conflict between Texas law and federal law. The Petitioner's statement of the law of the State of Texas at page 8 of its Petition that:

" . . . Texas trade secret law as applied in this case to a patented invention would obligate Petitioner to not use or disclose the Ballard invention to others, even after a patent on the invention issued"

is simply false.

The Petitioner *has* used the invention and the protection of the Ballard patent, but it cannot have done so without accounting to Respondent as a result of the relationship of confidence and special trust. There was a disclosure to the public *but* Petitioner is not the public under the facts in this case but a fiduciary guilty of fraudulent conduct.

CONCLUSION AND PRAYER

No federal questions have been timely raised or decided in the Texas Court of Civil Appeals; the judgment of the state court below is based on adequate state grounds independent of any federal question; and the judgment and decision of the Texas Court of Civil Appeals is correct. There are no issues of national economic importance in this case. Requiring fiduciaries to abstain from fraudulent conduct or respond in damages will not vary the scope of patent protection in different states nor frustrate the purposes and objectives of federal law. We, therefore, respectfully pray that the Petition for Writ of Certiorari to the Texas Court of Civil Appeals be denied.

Respectfully submitted,

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by

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been served on defendant-petitioner by delivering three copies to its attorney of record, A. H. Evans, 1835 First City National Bank Bldg., Houston, Texas 77002, this day of June, 1977.

EXHIBIT A

